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No. 76-33

In the Supreme Court of the United States

OCTOBER TERM, 1976

JIMMY CICERO ATKINSON AND
MOLDEN ATKINSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A) and the district court (Pet. App. B) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 1976. The petition for a writ of certiorari was filed on July 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court abused its discretion by denying petitioners' motion for a new trial based on allegedly newly discovered evidence.

2. Whether the district court abused its discretion by denying petitioners' requests for discovery and an evidentiary hearing on their motion for a new trial.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of North Carolina, petitioners were convicted of possession of heroin with intent to distribute and distribution of heroin, in violation of 21 U.S.C. 841(a)(1). Petitioner Molden Atkinson was sentenced to two consecutive terms of 15 years' imprisonment and three years' special parole. Petitioner Jimmy Atkinson was sentenced to 15 years' imprisonment as a young adult offender, followed by a three-year term of special parole. The court of appeals affirmed the convictions but remanded with instructions to vacate one of the two sentences imposed upon petitioner Molden Atkinson (512 F. 2d 1235).[1]

While the appeal from their convictions was pending, petitioners moved, pursuant to Rule 33, Fed. R. Crim. P., for a stay of further proceedings in the court of appeals and a remand to the district court on the basis of allegedly "newly discovered" evidence that a government witness had committed perjury at trial regarding the extent of his past criminal conduct. The court of appeals denied the motion without prejudice to petitioners' right to renew it in the district court (512 F. 2d at 1239-1240). Petitioners then moved in the district court for a new trial on the ground of newly discovered evidence and requested discovery and an evidentiary hearing on their motion. After consideration of the trial record, briefs, and supporting affidavits, the district court denied petitioners' motions (Pet. App. 3a-10a), and the court of appeals affirmed *per curiam* (Pet. App. 1a-2a).

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[1]The court of appeals found that, under the circumstances of this case, petitioner Molden Atkinson had possessed the heroin only at the moment of distribution and that it was not the intent of Congress to increase the maximum sentence under the statute where, as here, two violations of the same subsection were shown by a single act (512 F. 2d at 1240).

The facts underlying petitioners' convictions are set forth in the opinion of the court of appeals on direct appeal (512 F. 2d at 1237) and, insofar as relevant to petitioners' present contentions, in the opinions of the courts below (Pet. App. 2a, 4a-5a). They show that on July 18, 1973, at their home in Goldsboro, North Carolina, petitioners sold heroin worth $1,200 to Agent Curtis Douglas of the North Carolina State Bureau of Investigation. Arthur Burke, a confidential informant for the state Bureau of Investigation who had introduced Agent Douglas to petitioner Molden Atkinson, was present during the narcotics transaction.

At trial, Agent Douglas related the circumstances of his meeting with petitioners and described the negotiations for and details of the sale of the heroin. Burke corroborated the testimony of Agent Douglas. In addition, Burke admitted that he was a paid government informant, that he had been a narcotics addict for many years, and that his extensive prior criminal record included arrests and convictions for several serious offenses. When Burke was asked on cross-examination whether he had ever been convicted of a narcotics offense, he answered truthfully that he had not; however, he falsely denied any narcotics-related arrests and incorrectly stated that his last conviction had been in 1968 (Pet. App. 4a-6a). Subsequently, petitioners learned that Burke had been convicted in 1972 of the temporary taking of a motor vehicle and had been arrested for state narcotics offenses that were not prosecuted. Petitioners contended in their post-trial motion that Burke's contrary testimony was "so perjurious as to require a new trial" (Pet. App. 4a).

The district court disagreed, holding that petitioners had failed to discover this "new" evidence prior to or during trial because of lack of diligence and that, in any event, the evidence was merely cumulative and impeaching and

was not likely to produce an acquittal (Pet. App. 7a-8a). In addition, the district court concurred in the finding of the court of appeals on direct appeal (512 F. 2d at 1239) that "the information [about Burke's criminal background] was not known and could not have been inferred by the record to have been known by the United States Attorney" (Pet. App. 6a).

ARGUMENT

1. In order to prevail on a Rule 33 motion for a new trial on the basis of newly discovered evidence, a defendant must show that the evidence was discovered after the trial, that the failure to learn of the evidence was not the result of lack of diligence, that the new evidence is not merely cumulative or impeaching, that the evidence is material to the principal issues involved, and that the evidence is of such a nature that it would probably produce an acquittal. *United States* v. *Schwartzbaum*, 527 F. 2d 249, 254-255 (C.A. 2), certiorari denied, No. 75-819, March 1, 1976; *United States* v. *Meyers*, 484 F. 2d 113, 116 (C.A. 3). The district court and the court of appeals correctly concluded that petitioners could not satisfy these requirements, and these concurrent findings of fact warrant no further review.

First, petitioners failed to demonstrate that "the material asserted to be newly discovered is in fact such and could not with due diligence have been discovered before or, at the latest, at the trial." *United States* v. *Costello*, 255 F. 2d 876, 879 (C.A. 2), certiorari denied, 357 U.S. 937. See also *United States* v. *Anderson*, 509 F. 2d 312, 327, n. 105 (C.A.D.C.), certiorari denied, 420 U.S. 991; *United States* v. *Strauss*, 443 F. 2d 986, 989 (C.A. 1), certiorari denied, 404 U.S. 851. As the trial court noted (Pet. App. 8a-9a):

> From the first day of the trial, the defendants knew of Burke's identity. However, from the affidavit of the defendants' trial attorney, it appears that no effort was made to obtain the public record of the witness by either of the defense attorneys until after the convictions. The defense attorneys did not seek a continuance of any sort to have appropriate time to obtain this information.

Moreover, the evidence of Burke's criminal record was merely cumulative and impeaching. Burke had admitted at trial that he was a paid informant for the North Carolina Bureau of Investigation, that he had responded to the government's request to work on the instant case (Tr. 225, 245), and that he had a checkered career that included several serious convictions. Thus, as the court of appeals observed, Burke's possible lack of credibility or motive to falsify was clearly exposed (Pet. App. 2a):

> We think the jury got a clear picture of Burke's character and background, including his disposition to commit crime and his status as a government informant, and that if the jury had known of the arrest for a state narcotics violation and its subsequent nolpross that additional information would have had no effect whatsoever on the verdict.

See *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341; *United States* v. *Blackwood*, 456 F. 2d 526, 531 (C.A. 2), certiorari denied, 409 U.S. 863.[2]

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[2] *Giglio* v. *United States*, 405 U.S. 150, on which petitioners primarily rely, is distinguishable. In *Giglio*, the evidence showed that an indispensable government witness had testified falsely about a promise of leniency and that the government was aware of the promise yet had failed to disclose it. Here, as noted above, Burke's false statements concerned details of his criminal record—a matter already largely known to the jury—rather than a critical matter such as his possible bias. Despite petitioners' baseless assertion (Pet. 14), none of

Finally, as both lower courts found (Pet. App. 2a, 8a), the "newly discovered" evidence here was not likely to produce an acquittal. Burke's false testimony related solely to his past criminal background rather than to petitioners' involvement in the crime charged. Hence, the evidence did not exculpate petitioners. In addition, even assuming that the new evidence would be admissible at a retrial,[3] Burke's trial testimony only corroborated that of Agent Douglas, and "[t]he record appears to be void of anything produced at the trial which would have caused the jury to have disbelieved Agent Douglas when he identified the [petitioners] as the two individuals from whom he puchased the heroin * * *" (Pet. App. 8a). Compare *Giglio* v. *United States*, 405 U.S. 150, 154 ("the Government's case depended almost entirely on [the witness's] testimony; without it there could have been no indictment and no evidence to carry the case to the jury").

2. Petitioners contend (Pet. 14-19) that the district court erred in denying their motions for discovery and for an evidentiary hearing on their new trial claim. Although the Federal Rules of Criminal Procedure do not expressly provide for discovery in aid of motions for a new trial, the district court may permit discovery in collateral proceedings. *Harris* v. *Nelson*, 394 U.S. 286, 290.[4] Normally,

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the dismissals of state charges against Burke was contemporaneous with, much less related to, the events involving petitioners. Furthermore, unlike *Giglio*, in this case "there [was] no question presented of prosecutorial misconduct" (Pet. App. 2a). See n. 5, *infra*.

[3]As the district court and court of appeals noted (Pet. App. 2a, n. 1, 8a), a witness ordinarily may not be impeached by proof of prior arrests not leading to convictions. See Rule 609(a), Fed. R. Evid.

[4]Although *Harris* concerned a *habeas corpus* proceeding, its reasoning has been held applicable to a motion pursuant to Rule 33, Fed. R. Crim. P., at least when the new evidence is exculpatory. See, *e.g.*, *United States* v. *Wolfson*, 413 F. 2d 804, 808 (C.A. 2).

however, such motions are to be decided on the basis of the trial record and affidavits alone, and the decision whether to conduct an evidentiary hearing in a particular case is addressed to the sound discretion of the district court. *United States* v. *Scott*, 521 F. 2d 1188, 1195 (C.A. 9), certiorari denied, No. 75-5799, March 8, 1976; *United States* v. *Henson*, 486 F. 2d 1292, 1300, n. 7 (C.A. D.C.); *Gurleski* v. *United States*, 405 F. 2d 253, 267 (C.A. 5), certiorari denied *sub nom. Smith* v. *United States*, 395 U.S. 977.

The affidavits and other documents filed by petitioners clearly established Burke's false testimony and provided the district court with an adequate basis for assessing the materiality of the "newly discovered" evidence. Since the record showed that petitioners failed to exercise due diligence in obtaining the new evidence, that the evidence was merely cumulative and impeaching, and that it was unlikely to produce a different verdict, the court properly denied the motions for discovery and an evidentiary hearing.[5]

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[5]Although petitioners contend that a hearing was required to explore the issue of prosecutorial suppression, this Court has recently noted that a defendant's right to a new trial is determined by the evidentiary significance of the nondisclosed evidence rather than by the prosecution's willfulness or negligence in failing to produce it. *United States* v. *Agurs*, No. 75-491, decided June 24, 1976, slip op. 12-13. Thus, the district court was not required to hold an evidentiary hearing concerning prosecutorial misconduct. In any event, petitioners' motion for a stay of proceedings in the court of appeals had "made it plain that they made no claim that the prosecuting attorney had knowledge of the background of Mr. Burke at the time of the trial" (Pet. App. 5a).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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